IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 337.

INTERNATIONAL UNION OF MINE, MILL, AND SMELTER WORKERS, LOCALS Nos. 15, 17, 107, 108 AND 111, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION, PETITIONERS,

VS.

EAGLE-PICHER MINING & SMELTING COMPANY, A CORPORATION, EAGLE-PICHER LEAD COMPANY, A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD, RESPONDENTS.

BRIEF OF RESPONDENTS, EAGLE-PICHER MINING & SMELTING COMPANY, AND EAGLE-PICHER LEAD COMPANY, RESPONDENTS, IN OPPOSITION TO PETITIONERS' MOTION TO PERMIT CAUSE TO BE SUBMITTED UPON ABBREVIATED PRINTED RECORD, AND TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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A.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, sought to be reviewed, is now officially reported (R. 307; 141 F. 2d 843). The opinion of the court, enforcing at the instance of the National Labor Relations Board, the Order of the latter, is also officially reported (R. 187; 119 F. 2d 903).

B.

JURISDICTION.

The jurisdiction of this Court is sought to be invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act. Such jurisdiction is lacking for the reasons hereafter appearing.

C.

STATUTES INVOLVED.

The statute of the United States allegedly involved is the following: National Labor Relations Act (29 U. S. C. A., Ch. 7; Sec. 151, *et seq.*; 49 Stat. 449). These respondents assert that these statutory provisions are not in fact involved.

D.

QUESTIONS PRESENTED.

The alleged questions presented, as specified (Pet. p. 4) by petitioners, are not actually presented by the opinion below. Neither the respective authority of the Board and the court below to act upon the appearance of newly discovered evidence, nor the respective authority of the Board and the court below to act upon a difference between established and hypothetical facts, nor the respective authority of the Board and the court below to act upon a showing of fundamental error, is involved. The court below merely held that there was no factual basis for any one of these three alleged questions presented. Hence this is an application for certiorari wherein the claimed questions presented are not involved because of a complete lack of factual basis therefor under the record. The scope of the opinion below, in substantiation of this statement,

can best be demonstrated by quotation (141 F. 2d 843, l. c. 845):

"The National Labor Relations Board filed a petition in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2(d) and 3(b) of the final decree of this Court in this case dated and entered June 27, 1941, and to remand the subject matter of those paragraphs to the Board for further proceedings. The Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company have filed their answer to the Board's petition. The answer challenges this Court's jurisdiction and the sufficiency of the petition. The Board has now moved for judgment on the record and the pleadings, upon the grounds that no genuine issue of facts exists with respect to any material allegation of the petition and that the Board, as a matter of law, is entitled to the relief prayed for. The companies assert that the motion of the Board is without merit and should be denied and that the petition of the Board should be dismissed.

* * * * * * *

"We are not convinced upon the showing in these proceedings that the parts of the order and decree attacked were obtained by misrepresentation or wrongful conduct of the companies, or that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved.

"Our conclusion is that, while this Court has jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted, *the petition of the Board and the record in this case present an insufficient factual basis* for setting aside paragraphs 2(d) and 3(b) of the decree and for remanding the subject matter thereof to the Board. The motion of the Board for judgment upon its peti-

tion is therefore denied, and the petition is dismissed". (Italics ours).

E.

STATEMENT.

In the original proceeding an order of the National Labor Relations Board was entered (R. 25), which upon review was affirmed and enforced (R. 187).[1] These respondents vigorously opposed the entry of the decree as prayed by the Board; petitioners supported the Board in procuring the entry of such decree (R. 187). The findings of the Board are (with the exception noted) immaterial to the issues here involved; they are, however, quoted by petitioners at length for prejudicial purposes: We shall refrain from similar procedure. It appeared from the undisputed evidence, and is now undisputed even by petitioners, that following the strike in 1935 the employment level never rose to its former peak existing at the time of such strike. The Board, as a result, held that all of the pre-strike employees could under no circumstances have been reinstated, irrespective of whether such pre-strike employees were union or non-union members, claimants or non-claimants (R. 132 *et seq.*). *There is no dispute but that this conclusion was and is true.* In order, therefore, to meet the argument of these respondents that, under such admitted facts (admitted then and now), there was no showing that any particular claimant would, absent any conceivable discrimination, have been rehired, the Board conceived a remedy designed to compensate the claimants

[1]As will be hereinafter noted the printed record here filed is entirely inadequate to present the issues sought to be submitted, as well as violative of the rules of this Court. As a result reference to the printed record will be thus designated (*e. g.* R. 1). References to the typewritten transcript, unprinted, will be thus designated (Tr. 1).

upon a fractional basis (141 F. 2d, l. c. 844). The claimants number 209, and the proof disclosed, the Board found, the court below found, that very shortly after July 5, 1935, there was available employment for them (119 F. 2d, l. c. 913, 914). Thus the court below in the original enforcement proceeding confirmed findings of the Board that, immediately after July 5, 1935, 364 jobs opened up, which were available for the 209 claimants (119 F. 2d, l. c. 913, 914):

> "On July 5, 1935, the petitioners were operating with about 500 men. Their operations were not fully manned, and the evidence is that some men were taken on, so that by November 1, 1935, they were employing 864 men. *The Board found, justifiably, that petitioners from July 5, 1935, to November 1, 1935, had jobs available*". (Italics ours).
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> "This Court is of the opinion that if the evidence sustains the Board's finding that the striking employees would on July 5, 1935, *or thereafter while jobs were available*, have applied for reinstatement and would have returned to work except for the illegal condition of reinstatement imposed by petitioners, the Board had authority to make an appropriate order with respect to reinstatement and back wages". (Italics ours).

Thus there was no doubt in the mind of the then Board or of the court below that immediately after July 5, 1935, there was available employment for the 209 claimants. The then Board held, however, and the court below approved the discretionary remedy thereupon improvised, that the availability of jobs for the claimants was not the issue; if there had been no discrimination as charged, all pre-strike employees would have enjoyed equal rights but *all* could not have been rehired; and

that, therefore, there being no assurance that any one of the claimants would have been rehired, as against a non-claimant who was also a pre-strike employee, the claimant could at best enjoy only a proportionate, fractional back wage award. It should be stressed that it is conceded by petitioners that this fundamental premise of the Board remedy is true; it is not claimed that the post-strike employment level ever rose to the pre-strike employment level. The order of the Board was enforced by judicial decree (over the vigorous opposition of these respondents) on May 21, 1941 (R. 187).

On February 4, 1943 (R. 213), long after the decree procured by the Board and petitioners had become a finality, the successor Board filed its "petition for rule to show cause, to remand, and for other relief" (R. 213, 215, *et seq.*). It will be recalled that the "unusual condition" found by the original Board was that the post-strike employment level never reached the pre-strike employment level. The successor Board did not challenge this conclusion. It alleged, however, that its predecessor had been deceived into believing that on or after July 5, 1935, "there had been and would be less than sufficient work to afford employment to all the claimants" (R. 218). This deception allegedly occurred because these respondents "upon the hearing and thereafter, *inadvertently or otherwise*, withheld from the Board material facts peculiarly within their knowledge concerning the employment situation existing in the enterprise involved in the complaint" (R. 216). The contention was absurd in view of the fact that, with only 209 claimants, the Board (allegedly deceived) had affirmatively found from the proof that there were 366 new jobs created between July 5, 1935, and November 1, 1935 (R. 94). If, as the predecessor Board found, "498 men were employed (on July 5,

1935) and on November 1, 1935, 864 men were employed" (R. 94), then to argue to this Court that the then Board believed, and was deceived into believing, that there were insufficient new jobs after July 5, 1935, to accommodate 209 men, is plainly and contemptuously frivolous. The court below, moreover, pointed out that there was ample available employment for the 209 claimants since, according to the computation of the court, 364 jobs became available for the 209 claimants immediately after July 5, 1935 (119 F. 2d 913, 914). It is not strange, under these undisputed facts, that the court below (comprised of the same members who heard the original cause, who were familiar with the then record and the contentions made, and who therefore knew that no deception had been practiced) held that "the petition of the Board and the record in this case present an insufficient factual basis for setting aside paragraphs 2(d) and 3(b) of the decree and for remanding the subject matter thereof to the Board" (141 F. 2d, l. c. 845). Stronger language could have been properly used.

The Board petition to vacate the final decree was filed nearly two years next after the rendition of such decree (R. 213). As noted, it not only disclosed no new evidence, but disclosed only the facts known to the original Board and the court from the inception. The appendix (R. 231) was unverified. It purported merely to show, however, that there were more jobs after the strike than the number of claimants; this had been freely conceded by these respondents from the beginning; it had been found by the original Board and by the court. It was, as a result, entirely meaningless. In consequence these respondents filed a brief in opposition to being required to plead to a petition whose allegations were negatived by the record before the court. Without passing

upon the issues the court below ruled "that as a matter of orderly procedure the petition should be permitted to be filed and petitioners (respondents here) should be required to make formal answer thereto" (R. 281). Thereupon, pursuant to leave (R. 281), these respondents filed an appropriate pleading (R. 283). In turn the Board filed a motion for judgment (R. 291). These respondents countered by calling up their motion to dismiss. The cause was thereupon briefed, and argued. Petitioners have sought to incorporate in this record (without the authority of a bill of exceptions; or other recognized proof of authenticity) certain excerpts from the briefs filed by these respondents in the court below. We challenge the propriety of that procedure. If excerpts thus torn from context are to be considered, however, we feel that such briefs *in toto* should be before this court. These respondents could properly move to strike those unauthorized inclusions in the record, but are entirely willing that this Court should consider any brief by them filed. If, therefore, these excerpts torn from context are to be considered, we file herewith, as Exhibit A, the two briefs filed by respondents in the court below upon these issues. The Exhibit is entitled "Supplemental Brief on Behalf of Petitioners." It will be noted that the initial portion (pp. 1-26) constituted the final brief below; the subsequent portion (constituting the original brief below) was attached thereto. The complete absence of legitimate justification for the mis-statements of petitioners here is disclosed in the latter (pp. 2-43).

The opinion below was rendered on April 19, 1944 (R. 307). Thereafter, and for the first time, petitioners on May 11, 1944, filed a motion (R. 326, 327). On May 17, 1944, the court below denied both the Board petition for rehearing and the belated motion of petitioners (R. 343).

In proceedings below these respondents insisted that the pleadings, and the record already before the court, required both a denial of the Board motion for judgment and a dismissal of the Board petition. The Board allegations were insufficient; the Board allegations were affirmatively negatived by the record before the court. This position of respondents was sustained upon the ground, heretofore noted in the opinion below, that there was no "factual basis" for vacating the final decree. It is apparent from the opinion that this conclusion was arrived at after a consideration of the entire record. Petitioners, however, now propose to apply for certiorari, not upon a mere diminution of the entire record, but upon the most fragmentary excerpts therefrom. As petitioners concede, the entire record below, considered by the court in determining that there was no factual basis for the petition filed, comprised over 13,000 pages, exclusive of several hundred exhibits (Petitioners' Motion to Permit Cause to be Submitted upon Abbreviated Printed Record, p. 2). Mere lines, even words, of the certified record are torn from context (R. 348). Equally (R. 349) are lines, and even words, from the briefs of these respondents (never incorporated in the record or in any bill of exceptions) torn from context. Reference to the initial brief of these respondents (attached to the supplemental brief designated as Exhibit A herewith) will show that hundreds of pages of the record below are directly material (p. 36). It is thus plain that an examination of the entire printed record, as submitted by petitioners, would not permit an intelligent consideration of this cause. Counsel for these respondents advised petitioners that he would comply with the letter and the spirit of paragraph 8 of Rule 38 of this Court. Petitioners, however, submitted the proposed stipulation to him before the petition for certiorari was filed. Omitted from the present ab-

breviated record are innumerable matters essential to a consideration of the questions presented by the petition for the writ. The abbreviated record will not sustain the most insignificant percentage of the statements appearing in the petition itself. If reference be made to the initial brief of respondents, attached to Exhibit A filed herewith, it will appear that the abbreviated record is insufficient for the slightest consideration of the issues of this cause. We, therefore, shall suggest a plain non-compliance with the rules of this Court.

It should be particularly noted that, following the decision below, the Board, possessing exclusive control over its orders and their enforcement, elected not to seek certiorari. Notwithstanding this decision on the part of the sole litigant possessed of the right to pursue this remedy, petitioners have herein sought to appropriate a prerogative exclusively enjoyed by a public administrative tribunal. They are without capacity so to do. From every aspect, therefore, the petition for certiorari must be denied.

F.

SUMMARY OF THE ARGUMENT.

POINT I.

Petitioners' motion to permit cause to be submitted upon abbreviated printed record should be denied as violative of paragraphs 7 and 8 of Rule 38 of this court. Thereunder it is plain that it is the duty of petitioners: first, to file a certified transcript of the entire record; and, secondly, to print the entire record, except such portions thereof as may be omitted, pursuant to stipulation, as not essential to a consideration of the questions presented by the petition for the writ. The penalty for refusal to stipulate thereunder is a matter of costs. Here petitioners have failed to present a stipulation whereunder the matter essential to a consideration of the questions presented by the petition for the writ is included. Hence: (a) the motion to permit the cause to be submitted upon the inadequate abbreviated record must be denied because (1) the entire record has not been printed and (2) the abbreviated record, as printed, does not contain the matter essential to a consideration of the questions presented by the petition for the writ; and (b) the petition for certiorari must be denied because, the record not complying with the rules of this court, the petition is before the court without a record within the purview of paragraphs 1 to 8, inclusive, of Rule 38. Authorities: Rule 38 of the Rules of the Supreme Court of the United States, paragraphs 1 to 8, inclusive.

POINT II.

The present petition for certiorari is an attempt to discharge the administrative functions of the National Labor

Relations Board. This remedy is exclusively vested in the Board. Since the National Labor Relations Board has elected to pursue its remedy otherwise, petitioners cannot divest the Board of its inherent jurisdiction to determine in what manner the Act shall be effectuated. As a result, petitioners are without capacity to maintain or pursue their application for certiorari. Authorities: Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, 270, 84 L. Ed. 738; National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, 370, 84 L. Ed. 799; National Labor Relations Board v. Sunshine Mining Co., 125 F. 2d 757.

POINT III

The decision below, upon a purely factual basis, cannot be, and is not, in conflict with the decision of any other circuit court of appeals on the same matter, has not decided an important question of federal law which has not been, but should be, settled by this court, has not decided a federal question in a way probably in conflict with applicable decisions in this court, and has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Authorities: Wisconsin Electric Co. v. Dumore Co., 282 U. S. 813, 75 L. Ed. 728; Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922; United States v. Johnston, 268 U. S. 220, 69 L. Ed. 925; General Talking Pictures Corp. v. Western Electric Co., 304 U. S. 175, 190, 82 L. Ed. 1273, 1282; Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508, 68 L. Ed. 413; Stewart Corp. v. National Labor Relations Board, 129 F. 2d 481, l. c. 483.

POINT IV

The decision of the court below was plainly correct, both factually and legally. Even if factual issues were re-

viewable by this court on certiorari, that decision was the exercise of a sound judicial discretion in the determination of an issue of fact, which is not subject to appellate review. No abuse of that discretion appears since the certified record plainly shows the absence of the grounds of misrepresentation or mistake alleged in the petition in the nature of a bill of review filed below. The so-called newly discovered evidence disclosed no facts not theretofore appearing in the record at the time of the entry of the decree. There is no authority which will support the vacation of this decree, and the remand to the Board sought, under these undisputed facts. The proceeding below was instituted exclusively upon the theory that the Board was misled into, or fell into the inadvertent error of, believing that on and after July 5, 1935, the new jobs opening up in the plants of these respondents were insufficient to furnish employment to 209 claimants. The record clearly shows that the evidence established, that these respondents conceded, that the Board found, that the court below held, that either 364 or 366 jobs opened up immediately after July 5, 1935. Hence the Board, the present petitioners, these respondents, and the court below, at all times, knew that available jobs exceeded the number of claimants. Under these circumstances the claim of deception or inadvertent error was a plain and frivolous absurdity which the court below properly denied. That was the sole issue presented to that court. No petition for a bill of review could be entertained, or sustained, upon that undisputed record. Authorities: Southport Petroleum Co. v. National Labor Relations Board, 315 U. S. 100, 109, 86 L. Ed. 718; National Labor Relations Board v. Indiana and Michigan Electric Co., 318 U. S. 9, 36, 87 L. Ed. 579; Stewart Die Casting Corp. v. National Labor Relations Board, 129 F. 2d 481.

C.

ARGUMENT.

POINT I.

Petitioners' motion to permit cause to be submitted upon abbreviated printed record should be denied as violative of paragraphs 7 and 8 of Rule 38 of this court, and the petition for certiorari should be denied.

Non-compliance with rules persists throughout this application for certiorari. The entire purpose of paragraphs 1 to 8, inclusive, of Rule 38 of this Court is, as we apprehend, this: That, immaterial matters excluded, the printed record shall comprehend the entire record below to the end that, upon consideration of the application for certiorari, this Court shall be as well advised as the court below. We suggest that, if we are correct in these views, there has never been a record submitted to this Court as plainly fragmentary and inadequate as that here filed. The decision of the court below was based upon the entire record, encompassing more than 13,000 pages and several hundred exhibits. Yet, petitioners would pretend to bring before this Court half a dozen pages, from the many thousands, excerpts torn from context, with the assurance that those insignificant excerpts constituted the only material evidence after five months of trial. The refusal of counsel for respondents to execute that stipulation, under these circumstances, need not be further justified. The procedure followed by petitioners does not subserve an intelligent consideration of their application for certiorari; it prevents it. It casts the burden upon this Court of determining, upon an attenuated record of half a dozen pages, whether the

Court below was correct in its factual decision upon a consideration of 13,000 pages and several hundred exhibits. If such procedure upon review by certiorari should be approved, the burden of such review would be incredibly increased. The average litigant can tear a word or a sentence from context, and, if permitted to do so, find plausible support for his contentions. We apprehend that that is not the purpose of the rules of this Court. Not even that plausibility, it may be noted, here appears.

We have referred heretofore to the brief filed by these respondents below, and filed herewith as an exhibit. A reference to that brief will disclose that no part of the record relied upon by these respondents is included in the printed record herein filed. More than that: The very statements of fact relied upon by petitioners cannot be found in or supplied from that printed record. It is our understanding that the rules of this Court require that the entire record, under consideration of the court below, be here printed. The only exception to this doctrine is that counsel "should stipulate to omit from the printed record all matter not essential to a consideration of the questions presented" (Par 8, Rule 38). We suggest that no one would require counsel for these respondents to stipulate to this fragmentary record as constituting all of the matter essential to a consideration of the questions presented.

We do not contend, we have never contended, that this entire record should or must be printed; we have contended, we do contend, that this pitiful fragment cannot constitute a compliance with the rules. No effort was made to arrive at an adequate printed record. A stipulation was arbitrarily submitted, even before the petition for certiorari was filed, and manifestly could not be accepted.

This non-compliance with rules in the proposed stipulation, and in the abbreviated record, has been followed into the petition. The questions presented do not conform to the specifications of error; the specifications of error do not conform to the reasons for the granting of the writ; and the latter conform to neither of the former. We do not insist upon technicalities; but we do insist that petitioners' failure to comply with the rules of this Court precludes any intelligent consideration of the issues raised by their application. No reference to the abbreviated record in this cause will permit an intelligent determination of these issues. Under these circumstances we submit that the motion to permit this cause to be submitted upon the abbreviated record should be denied, and the petition for certiorari dismissed.

POINT II.

Petitioners are without capacity to maintain the application for certiorari.

The petition in the nature of a bill of review was filed below by the Board. The decision thereon was rendered. Subsequently only did petitioners file their initial motion (R. 326). There can be no serious dispute but that the controversy adjudicated below involves the administrative remedies to be pursued by the Board in effectuating the purposes of the Act. After the decision adverse to the Board position was rendered by the court below, the Board, the only qualified litigant adverse to these respondents, elected not to seek certiorari. Petitioners, however, notwithstanding this decision of the public administrative agency, proceeded to apply for certiorari independently. The argument permeating their entire petition is that the court below has unduly curtailed the administrative rights and functions of the Board in enforcement of its findings

Such enforcement is unmistakably the exclusive function of that administrative agency. Petitioners can neither supersede nor supplant the Board in the administration of its duties; and the Board in turn could not delegate the administration of such duties to petitioners. The latter plainly regard the Board order, enforced by the decree below, as constitutive of private rights to be prosecuted by private means; the contrary is true, that the rights are public, to be enforced only by the public administrative agency vested therewith. Under the law the Board formulates its order; under the law it determines in what Court, when, and by what method, it enforces such order. No other person, group or corporation is vested with that right. No person may object other than that person "aggrieved by a final order of the Board * * *" (National Labor Relations Act, Ch. 7, 29 U. S. C. A., Sec. 160 (f)). The relief thus extended, to such person aggrieved, is to apply for a review of the final order by the United States Circuit Court of Appeals. There is no pretense that petitioners were aggrieved by the final order of the Board, or sought such review. To the contrary, petitioners intervened to procure the decree which they now contest. When, however, petitioners now seek certiorari upon the ground that the administrative rights of the Board have been unduly curtailed, that their theory of Board authority is essential to the effectuation of the purposes of the Act, although the Board has elected not to proceed by certiorari but otherwise, then petitioners have plainly presumed to seize upon public rights as their own and are manifestly without capacity to sue. They felt it necessary to join the National Labor Relations Board in this proceeding as an adversary party. If the right to administer this Act were not exclusively vested in the Board, incredible conflicts would inevitably arise. The Board would be seeking

enforcement by contempt while an interested union would be seeking enforcement by vacation of a decree. The resulting confusion need not be stressed. The complete incapacity of petitioners to discharge the administrative functions of the Board by this application for certiorari, is explicit and unambiguous under controlling decisions: *Amalgamated Utilities Workers* v. *Consolidated Edison*, 309 U. S. 261, 84 L. Ed. 738; *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799; *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757. In the first authority cited it is pointed out that no court has jurisdiction to entertain an attempt by any private person or group to discharge the administrative functions vested in the Board (l. c. 270), and that the only right vested in a private person or group is to *contest* a final order of the Board and not to *enforce* it (l. c. 266). Petitioners will not assert that they are contesting a Board order; they seek to enforce a claimed Board remedy. If, moreover, petitioners were to assert that they are seeking to contest a final Board order, then plainly they are some five years too late to do so under the Act.

The Board having elected not to pursue its remedy of certiorari from the adverse decision below, petitioners cannot succeed thereto, and in consequence are without capacity to maintain the proceeding.

POINT III.

The decision below, upon a purely factual basis, cannot be, and is not, in conflict with the decision of any other circuit court of appeals on the same matter, has not decided an important question of federal law which has not been, but should be, settled by this court, has not decided a federal question in a way probably in conflict with applicable decisions in this court, and has not so far departed from the

accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

We have heretofore noted that the alleged "questions presented" were not involved in the decision below, and that that decision was purely factual. A factual decision will not be reviewed upon certiorari. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68 L. Ed. 413; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273; *United States v. Johnston*, 268 U. S. 220, 69 L. Ed. 925. We suggest that petitioners have ignored the recognized limitations upon the function of certiorari. *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. Ed. 922.

Petitioners claim conflict only upon the basis of the decision in *American Chain & Cable Co. v. Federal Trade Commission*, 142 F. 2d 909. It is difficult to see how there can be even a pretended claim of conflict. As the court pointed out in the authority cited, involving orders of the Federal Trade Commission, such orders are future and prospective in operation, and therefore may necessarily be rendered inappropriate by changing conditions. There is no claim in the instant case of any change of conditions; and the back pay order involved was a finality at the time of the rendition of the decree; by that decree rights were then fixed; such rights did not continue *in futuro* subject to changing conditions. Under the Federal Trade Commission Act, moreover, the Commission is specifically vested with power to modify or vacate its orders after final judgment, and the authority cited so holds. No such power is vested in the National Labor Relations Board. These respondents have recognized and stressed from the beginning the difference between a continuing and prospective decree, and a decree which gives protection "to rights fully accrued upon facts so

nearly permanent as to be substantially impervious to change." *U. S.* v. *Swift*, 286 U. S. 106, 76 L. Ed. 999. Respondents have heretofore cited (Orig. Br. p. 47) *Stewart Corp* v. *National Labor Relations Board*, 129 F. 2d 481, l. c. 483, as applicable to the instant case under that doctrine. There can be no question but that the back pay award in the instant litigation was designed to give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and there is no pretense that the action of the Board below, or the attempted action of petitioners here, has been sought because of any change of conditions subsequent to the entry of the decree. It may be noted that a purported conflict in decisions, moreover, arising from differences in fact, and not in the application of a principle of law, will not support certiorari. *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U. S. 813, 75 L. Ed. 728.

The purported reasons advanced by petitioners may be very briefly considered: *FIRST*: Petitioners suggest that the Board, even after final decree, may at any time change its mind as to the remedy to be adopted to expunge unfair labor practices, and that the court must thereupon act as a mere automaton to permit the Board to do so (Pet. pp. 14, 15). The court below determined that there was no new evidence which did not already appear in the record, and hence that the Board could not frivolously decide to rescind one remedy which it had caused to be incorporated in a final decree then years old, and adopt another. We assume that this Court will not accept the suggestion of petitioners that, after procuring a final decree, and the term having passed and the decree having become a finality, the Board may at any time determine that it should revise its order thus enforced. If such a doctrine were accepted, or even tentatively suggested judicially, all certainty

in labor relations would disappear. The Court below explicitly held that it was for the Board to determine how the effects of prior unfair labor practices should be expunged (119 F. 2d, l. c. 915). The claimed conflict is transparently unreal: The Board initially determines the method for expunging unfair labor practices, and thereupon seeks enforcement by the court. To suggest that, after the decree thus procured becomes a finality, the Board can vacate that decree at its own option, and sustain a petition for a bill of review in equity without adequate showing of fact, is to subordinate judicial processes to the vagaries of arbitrary administrative action. No authority, state or federal, justifies the position of petitioners. *SECOND:* Petitioners argue that the cause should have been remanded to arrive at the specific amount of back pay awarded. The difficulty with the authorities cited by petitioners is that such authorities contemplate a remand for the determination of a concrete amount of back pay *under* the decree. The Board below sought a remand, not to enforce the decree, not to determine the amount of back pay due thereunder, but to vacate and destroy the decree. So far as these respondents know there is no authority which even intimates that a court must remand to an administrative agency its final decree for the purpose of the vacation, destruction, or modification of the latter. Certainly petitioners must recognize the distinction between an attempted remand for the enforcement of a decree, and an attempted remand designed for its abrogation. Courts of the United States are not compelled to divest themselves of their judicial function or to transfer such judicial function to an administrative agency. When the Board below filed its petition in the nature of a bill of review in equity, it undertook the burden of establishing the facts alleged. It is elementary that that factual issue was one for the

sound discretion of the court and such issue was the only issue determined below. *THIRD*: Petitioners contend that the discovery of new evidence, following an order of the Board, justifies a remand. This contention is apparently made under the provisions of Section 10(e) of the National Labor Relations Act (29 U. S. C. A., p. 239). It reads as follows:

> "If either party shall apply to the Court for leave to adduce additional evidence, and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order."

Initially it should be noted that this provision applies exclusively to the action of the court before final decree, and not thereafter. The Board below did not proceed, moreover, under this section, but under the general equitable procedure of a bill of review. Even if this provision were applicable, moreover, the court below denied the remand upon factual grounds, namely, that there was no sufficient factual showing of the materiality of the claimed evidence (which was already in the certified record), or of any reasonable grounds for the failure to adduce such evidence theretofore. The action of a court on application to remand under these circumstances is, moreover, discretionary, and no abuse of the discretion here

appears. *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U. S. 100, l. c. 104, 86 L. Ed. 718; *National Labor Relations Board* v. *Indiana Electric Co.*, 318 U. S. 9, l. c. 16, 87 L. Ed. 579. *FOURTH*: Petitioners further argue that, in any event, the back pay award was subject to remand for the period between the date of the close of the hearing before the trial examiner and the date of re-instatement. They cite no authority therefor. The simple answer to the contention made is that the Board order, and the final decree below, definitely and irrevocably fixed the rights involved. No change of conditions thereafter occurred, or are claimed to have occurred. No adjustment was sought either by the Board or petitioners in the intervening interim. There is no arbitrary right to vacate a decree, final by the lapse of the term, by a petition for bill of review without factual proof in support thereof. *FIFTH*: Petitioners urge that, since the Board charged that it had unearthed newly discovered evidence, the court was precluded from examining this position upon a petition for a bill of review, and mandatorially required to accept it. The absurdity of such a contention is its own refutation. When the Board below presented its petition to the court, it alleged deception and newly discovered evidence, together with a claim of due diligence; the certified record before the court disclosed that each of the claims was equally unfounded. Petitioners, however, contend that the court, as we have heretofore said, as a mere automaton was compelled to place the imprimatur of its approval upon a falsehood or falsehoods, and to vacate its decree and to remand the cause upon the mere demand of an administrative agency. It is self-evident that when the Board invoked the jurisdiction of the Court below to pass upon the factual issues of its petition for a bill of review, it necessarily submitted those factual issues to that court. Those issues have

been decided, and petitioners fail to point out any error in the decision. *SIXTH*: Petitioners further suggest that the Board was guilty of error. If it was, then the remedy of petitioners, as aggrieved litigants under the Act, was to file a petition for review. They did not do so, and, to the contrary, joined with the Board in procuring the decree incorporating the alleged error. There is no claim that this asserted error was subsequently revealed by reason of newly discovered evidence; to the contrary, petitioners now charge it was mathematical in character. If so, it appeared upon the face of the order which petitioners caused to be incorporated in the final decree below. This suggestion is too frivolous for further discussion. *SEVENTH*: Petitioners finally make an argument *ad hominem*. The concluding paragraph of the decision below is a complete answer thereto.

In view of this record it is not strange that the Board elected not to pursue any remedy by certiorari. Petitioners cannot do so.

POINT IV.

The decision below was correct; the court exercised its discretion properly under the undisputed facts; and certiorari is not justified.

In view of the fact that petitioners, by incorporating in the abbreviated printed record limited excerpts of the briefs of respondents below, have compelled the latter to file those briefs as Exhibit A hereof, in the interests of brevity we adopt the argument therein made. We refer particularly to the original brief of respondents attached to the supplemental brief (immediately following page 26 thereof). Therein (pp. 2-43) the theory of the Board below, the original Board findings, the Board remedy, the initial opinion of the court below, the Board petition in this proceeding, the appendix to the Board petition, the Board brief,

the facts embraced in over 13,000 pages of record, the arguments made during the course of the litigation, are analyzed to show conclusively the complete absence of merit in the allegations of the Board in its petition in the nature of a bill of review.

It would extend this argument interminably if we were to review these record facts again. We have noted heretofore that it is undisputed that the employment level following the strike never rose above the pre-strike level. This did not mean, these respondents did not assert, that there were not more than 209 new jobs available after July 5, 1935. We have heretofore noted that the Board found, the court below found, that there were nearly 400 jobs available immediately after July 5, 1935. The original Board properly held, however, that, in view of the reduced employment level, there was no certainty that the 209 claimants would have received 209 of these available positions if there had been no discrimination whatsoever. That was the whole basis of the formula of the original board. The subsequent claim, made in the court below, was plainly an afterthought. The court below so held.

As indicated in the briefs filed herewith as Exhibit A (and so filed solely because excerpts therefrom have been by petitioners torn from context and incorporated in the purported record here), the court below could have predicated its decision equally well upon legal grounds. It did not do so, but preferred to review the entire record to determine whether there was the slightest scintilla of merit in the allegations made by the Board. Upon that review it determined that the Board claim, under the pleadings and the record already before the Court, was so plainly unsupported that it concluded:

> "Our conclusion is that, while this Court has jurisdiction over the enforcement of all of the pro-

visions of its decree which remain unexecuted, the petition of the Board and the record in this case present an insufficient factual basis for setting aside paragraphs 2 (d) and 3 (b) of the decree and for remanding the subject matter thereof to the Board. The motion of the Board for judgment upon its petition is therefore denied and the petition is dismissed."

Petitioners' motion to permit cause to be submitted upon the abbreviated printed record, and their petition for certiorari, should be denied.

Respectfully submitted,

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